SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 416

THE AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY,
Petitioners,

against

KING-SIZE PUBLICATIONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The American News Company and The Union News Company, your petitioners, respectfully pray that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Third Circuit dismissing the petitioners' appeal to that Court, for want of jurisdiction.

Opinion Below

The opinion of the United States District Court for the District of New Jersey is not reported officially but may be found in printed Appendix "A" hereto. The order of the United States Court of Appeals for the Third Circuit is printed in Appendix "B" hereto.

Jurisdiction

The order of the United States Court of Appeals for the Third Circuit was entered on June 22, 1961. No petition for re-hearing was filed. The jurisdiction of this Court is invoked by the petitioners under the provisions of the Judicial Code (28 U. S. Code Section 1254).

Question Presented

Whether the District Court's action in setting aside the verdict of the jury in favor of the defendant on the grounds that statements made by a juror after the trial indicated a prejudicial state of mind during the trial, although the juror vigorously denied that he had any prejudice during the trial, was an appealable order.

The Statute Involved

The statute involved in this case is 28 U. S. Code Section 1291.

> "Sec. 1291. Final decisions of district courts
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, Sec. 12(e), 72 Stat. 348."

Statement

This is an action brought pursuant to the Federal Anti-Trust Laws wherein the respondent sought triple damages from the petitioners.

After a two week jury trial, on February 10, 1961 the jury brought in a verdict in favor of the petitioners-defendants.

On February 12, 1961, a juror submitted a letter to the Chief Judge of the United States District Court for New Jersey, which letter is printed in the printed Appendix "A" hereto. Following the receipt of the letter, the respondent moved for a new trial claiming that the juror was prejudiced, using the letter as a basis for such contention. There followed two hearings at which the juror, William F. Murphy, testified under questioning by the Court and the attorneys for the respective parties. The juror most emphatically stated that he did not have any prejudice at any time during the trial.

The District Court granted the motion for a new trial questioning the "impartiality" of the juror. An appeal was taken to the Court of Appeals for the Third Circuit. A motion was made in that court to dismiss the appeal for lack of jurisdiction, the respondent claiming that the order of the District Court was an interlocutory order and not a final order. The Court of Appeals dismissed the appeal for want of jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

The decision of the United States Court of Appeals below dismissing the appeal for lack of jurisdiction is believed to be in conflict with a prior decision of this Court and decisions of other courts on a basic question which is important in connection with Federal procedure on appeals.

II.

An important question of Federal law is involved as to the basic right of a trial by jury and if the decision of the Court below is allowed to stand it would be basically destructive of such right of trial by jury guaranteed by the Constitution of the United States.

I.

The decision of the United States Court of Appeals below dismissing the appeal for lack of jurisdiction is in conflict with a prior decision of this Court and decisions of other courts on a basic question which is important in connection with Federal procedure on appeals.

This Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1948), held that a motion to require security in a pending action was a final order and could be appealed to the Court of Appeals. The Court stated:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independ-

> ent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia *v.* Sweeny, 1 Pet. (U. S.) 567, 569, 7 L. ed. 265, 266; United States *v.* River Rouge Improv. Co., 269 U. S. 411, 414, 70 L. ed. 339, 343, 46 S. Ct. 144; Coddledick *v.* United States, 309 U. S. 323, 328, 84 L. ed. 783, 786, 60 S. Ct. 540.
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

There is an important distinction on the question of appealability of decisions on motions for a new trial between those in which the lower court was required to consider matters involved in the trial and those which were extraneous to the trial itself. As was held in the *Cohen* v. *Beneficial Industrial Loan Corp.* case, the matter is "too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated."

It has been held in *John E. Smith's Sons & Co.* v. *Lattimer Foundry and Machine Co.*, 239 Fed. 2d 815 (3rd Cir. 1956), that an order denying a motion for a new trial may be appealed where it is necessary to "decide a question of law which arose after the entry of the original judgment * * *" This decision found support in the Supreme Court's decision in *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 482-483, where Justice Brandeis stated:

> "Under certain circumstances the Appellate Court may inquire into the action of the trial court on a motion for a new trial."

In those cases where the Court of Appeals has denied jurisdiction, the issues concerned were the issues of the trial of the case itself and not new issues arising after the trial.

Thus, there presently appears to be a direct conflict between the decision of this Court and the decision of the Court of Appeals sufficient to support a granting of a writ of certiorari in this case.

II.

An important question of Federal law is involved as to the basic right of a trial by jury and if the decision of the Court below is allowed to stand it would be basically destructive of such right of trial by jury guaranteed by the Constitution of the United States.

We are dealing here with the right of trial by jury and the decision of the lower court presents an extraordinary instance of an order entered on a hearing after the trial of facts which has no relation whatsoever to the issues of fact or law in the trial.

The appeal is concerned solely with the subjective political, social and economic opinions of a juror expressed only after the trial. No trial could possibly be safe against a juror's post-trial statements as to his state of mind, if this decision is allowed to stand without appeal. To require a new trial at this time without a full hearing on appeal on this vastly important question would appear to be going far beyond the scope of the existing precedents. Here we have the most extreme instance of a juror being allowed to impeach his own statements by a statement that he developed prejudices after the trial. What chance has the jury system against such an open door? All that a juror needs to do to destroy a verdict under the decision

below is to state after the verdict that he had prejudices.

Justice Brewer in *Perry* v. *Bailey*, 12 Kansas 539, is quoted as follows:

> "Public policy forbids that a matter resting in the personal conscientiousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to induce bad faith on the part of the minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict."

As the Court said in *Southern Pac. Co.* v. *Klinge* (CCA Tenth, 1933), 65 F. 2d 85: "A losing party may not, in any type of case, explore a juror's mind for the purpose of demonstrating that his vote resulted from a misconception of the evidence or a misunderstanding of the charge or from prejudice."

The decision for which a review is sought goes to the very heart and essence of our jury system. To permit a new trial before this issue is decided would not only cost the taxpayers a great deal of money, put the parties to a great expense, but would be contrary to sound public policy and the practical administration of justice.

It is submitted that the action of the lower court in this instance is so basically destructive of the right to trial by jury as to present constitutional questions of due process which are final in all respects. To encumber the courts with a new trial before determination of this important matter would be to establish a precedent setting back immeasurably the efficacy of our jury system which is deep rooted in our Constitution.

We submit that this phase of the case gives added force to the necessity of a review thereof by this Court.

CONCLUSION

The writ of certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

CORNELIUS E. GALLAGHER
and ROTH & RISEMAN,
Counsel for Petitioners.

EUGENE F. ROTH,
BARRETT G. KREISBERG,
Of Counsel.

APPENDIX A

United States District Court

DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 951-59

KING-SIZE PUBLICATIONS, INC.,

Plaintiff,

v.

THE AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY,

Defendants.

OPINION AND ORDER

After the trial of the instant private anti-trust action, which lasted ten days and resulted in a jury verdict of no cause for action, plaintiff has moved for a new trial on the ground that the verdict was against the weight of the evidence, and upon a further ground.

Insofar as the motion of plaintiff to set aside the verdict on the ground that it was clearly against the weight of the evidence is concerned, the court is of the opinion that the verdict was consonant with the proofs adduced, and that the jury was in proper exercise of its function in this regard.

The second ground is based upon a letter received by the Chief Judge of this court, as follows:

Appendix A

615 Pavonia Ave.
Jersey City 6, N. J. 2/12/61

Honorable William F. Smith
U. S. District Court
Newark, N. J.

Re: Jury Duty

Dear Sir:

I have recently completed ten days of jury duty in Hon. Thos. F. Meaney's Court where an Anti-Trust case was disposed of but have been requested to return on 2/15/61 for further participation. In this case I based my decision to the best of my ability to interpret the court's charges. However, as I am extremely prejudiced in Anti-Trust cases and Tax evasion cases, I am hereby asking to be excused as a juryman from cases which involve the above mentioned.

Due to far reaching political issues; polyglot, socialist and communist Federal legislation has become prevalent to the point where it stands out as the "Essence of Conflict" & is extremely discriminatory & prejudicial. I am not an attorney, Socialist or Communist & it is not my purpose to attempt to formulate a paradox for the courts of the U. S. I just wish to emphasize that while a Federal law exists allowing Labor Union Racketeers to dictate wages & working conditions (by force), I will never render a decision in favor of a Plaintiff in Anti-Trust or Tax evasion cases. As far as I am concerned the "Labor Law" is "Ipso Facto" & should allow an employer engaged in I.C. the privilege of anything he sees fit! I have no money but by Heritage I am a Capitalist & American!

Yours respectfully

(Signed) Wm. F. Murphy
Juryman #1

Appendix A

Hearings were had, juror Murphy was examined at length by counsel and the court, and briefs were submitted.

It is universally recognized, and courts of all jurisdictions have determined, that in criminal cases a fair and impartial jury is an essential element of every trial. And that means that *every* juror must be of the type qualifying as fair and impartial. Time after time courts have stressed the indefectibility of this requirement. And since the principles of justice are universal, in spite of the fact that in criminal cases human liberty and life may be at stake, the same requisites of proper administration of justice must exist in principle for all legal proceedings, civil or criminal. Therefore the same high standards for jurors must be adhered to in civil litigation as prevail in criminal trials.

Juror Murphy asserts a violent and long-standing antipathy to federal legislation dealing with income taxation and labor management relations. From his letter and from his testimony it appears that Murphy's antipathy has grown to include the anti-trust laws. The crucial question is, what credence is to be given to juror Murphy when he asserts that his feelings as to the anti-trust laws arose only upon reflection during the short period of time (2 days) between the verdict and his letter. In the course of his examination counsel for the defendant, paraphrasing Murphy's testimony, said "And after the case was over you decided that in all fairness you didn't wish to serve as a juror in these two types of cases, because somehow or other you had developed a strong feeling about them; is that correct?" To which Murphy replied "That's putting it magnificently."

Appendix A

The court is of the opinion that Murphy's deep-seated prejudice against plaintiffs under federal laws, including the anti-trust laws, antedated or at least coexisted with the trial of this action. Under the circumstances Murphy's impartiality is so seriously open to question that the court in its discretion will set the verdict aside and order a new trial.

In view of the foregoing, it is on this 11th day of April, 1961, ORDERED that the verdict of no cause of action returned in this action be set aside and a new trial upon all of the issues be had.

THOMAS F. MEANEY
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13647

THE AMERICAN NEWS COMPANY and
THE UNION NEWS COMPANY,

Appellants,

v.

KING-SIZE PUBLICATIONS, INC.,

Present: GOODRICH, McLAUGHLIN and KALODNER,
Circuit Judges

Upon consideration of the motion by appellee to docket and dismiss the appeal in the above entitled case, and of appellants' answer, and of memoranda in support and in opposition to the motion, and after hearing;

It is ORDERED that the appeal be and it hereby is docketed and dismissed for want of jurisdiction.

By the Court,

GOODRICH
Circuit Judge

Dated: June 22, 1961

SUPREME COURT, U. S.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S MEMORANDUM IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESPONDENT'S MEMORANDUM IN OPPOSITION

The proceeding below was an appeal from an interlocutory order of the District Court granting a motion for a new trial. Petitioners had not complied with 28 U.S.C. § 1292(b) which reads as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

In the court below the respondent moved to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction without the statement of the trial judge provided in the above statute. The appeal was docketed and dismissed.

It is apparently petitioners' contention that it is unnecessary for them to exhaust the remedy which Congress gave them under which they conceivably might have induced the court below to grant them their appeal. They say that the action of the lower court was "so basically destructive of the right to trial by jury as to present constitutional questions of due process which are final in all respects."

Thus this Court is asked to decide a constitutional question which might not have arisen if petitioners had asked the trial court to include a statement in his order on the basis of which an appeal might have been taken, and which will never arise in this case if

judgment is given for the petitioners on the second trial. It seems to us inconceivable that certiorari can be granted on these grounds in the light of this Court's repeated statements that constitutional questions will be avoided unless the procedure below compels the Court to consider them.

Apart from this insurmountable procedural barrier which prevents this Court from deciding the constitutionality of the order granting a new trial, the substance of petitioners' contentions seems equally frivolous. It is well settled that an order granting a new trial is not a "final decision" appealable as a right under 28 U.S.C. § 1291; *Frank Mercantile Corporation* v. *Prudential Insurance Company of America*, 115 F. 2d 496, 497 (C.A. 3, 1940); 6 Moore Fed. Prac. 3896 and cases cited. The rule is no different because the order granting a new trial is based on misconduct of the jury. *Aluminum Company of America* v. *Loveday*, 273 F. 2d 499 (C.A. 6, 1959); *Aubertin* v. *State Farm Mutual Automobile Insurance Company*, 252 F. 2d 96 (C.A. 5, 1958). Furthermore there is no constitutional right for an appeal from an interlocutory order except when "it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940). Here petitioners will not be deprived of a review. The order granting a new trial can be appealed after final judgment.

The cases cited by petitioners are so clearly not in point that we think it unnecessary to anaylze them.

We therefore urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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